Mazer Chemicals, Inc. *and* **Roger Tobara.** Case 13–CA–19983

30 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 30 December 1981 Administrative Law Judge Helen F. Hoyt issued the attached decision. The Respondent and the General Counsel filed exceptions and briefs, and the General Counsel filed an answering brief and a motion to strike a portion of the brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[2]

The judge concluded that the Respondent did not violate Section 8(a)(1) of the Act by discharging employee Roger Tobara in April 1980. In so concluding, the judge found that Tobara was engaged in protected concerted activity under the Act in making complaints to the Respondent about unsafe working conditions at its plant. Nevertheless, the judge found that Tobara was discharged for cause, because of the disruptive and belligerent nature in which he made his complaints, his failure to adhere to safety and maintenance standards in the handling of equipment and chemicals, and the deteriorating quality of his work. We find it unnecessary to reach the judge's conclusion that Tobara's conduct otherwise warranted discharge, for we find that the General Counsel has not established that Tobara was engaged in concerted activity protected by the Act when he made his safety complaints.

In our recent decision in *Meyers Industries*, 268 NLRB 129 (1984), we held that activities will not be found to be "concerted" within the meaning of the Act, unless they are engaged in with or on the authority of other employees. In so doing, we overruled *Alleluia Cushion Co.*, 221 NLRB 999 (1975), on which the judge relied on finding Tobara's conduct to be concerted protected activity.

The judge rejected the General Counsel's contention that Tobara acted in actual concert with other employees in making certain of his safety complaints, and the General Counsel renewed this argument in his exceptions. Based on our review of the record, we find that, even assuming arguendo a number of the incidents in which Tobara was involved constituted concerted activity, it is clear that Tobara was discharged for his entire course of making complaints, the vast majority of which were clearly individual complaints in which Tobara acted alone and for his own benefit.[3] Accordingly, we conclude that the General Counsel has failed to establish by a preponderance of the evidence that Tobara was discharged for concerted activities within the meaning of the Act and, applying *Meyers*, we shall dismiss the complaint in its entirety.[4]

ORDER

The complaint is dismissed.

[1] Given our disposition of this case, we find it unnecessary to pass upon the General Counsel's motion to strike.

The Respondent also filed a motion for leave to cite recent Board cases. We grant the motion.

[2] In the caption of her decision, the judge inadvertently designated Wanda L. Moses as counsel for the Respondent rather than counsel for the General Counsel.

[3] The record reveals that, on one occasion, Tobara complained to Supervisor Guilbault about a ventilation system in the presence of another employee. However, the record does not establish that Tobara's complaint was engaged in with, or on the authority of, the other employee. The record also reveals that, on two occasions before his discharge, Tobara spoke with employee Mike Yuswat regarding separate problems in the reactor room. On the first occasion, Yuswat filed a maintenance request over the problem and on the second recommended that Tobara call the plant engineer. Yuswat was a member of an in-plant discussion committee, created by the Respondent for the purpose of raising to management a variety of problems on the job. It is not clear from the record whether Yuswat acted as an interested employee in discussing these problems with Tobara, or as an agent of the Respondent's committee. However, even assuming that Tobara's conversations with Yuswat constituted concerted activity protected by the Act, in view of our finding that Tobara was discharged for a course of complaints, the overwhelming majority of which were not concerted, we conclude that the Respondent would have discharged Tobara even absent his concerted protected activity.

[4] On 22 February 1984 the Respondent filed a motion to dismiss the complaint on the basis of *Meyers Industries*, 268 NLRB 129 (1984). For the reasons stated herein, we grant the Respondent's motion.

DECISION

STATEMENT OF CASE

HELEN F. HOYT, Administrative Law Judge. This case was heard at Chicago, Illinois, on March 5, 6, 16, and 17, 1981, pursuant to a charge filed on June 2, 1980, and a complaint issued on August 8, 1980. The issue presented is whether Respondent Mazer Chemicals, Inc. discharged Roger Tobara because of his concerted protected activities, in violation of Section 8(a)(1) of the National Labor Relations Act.

On the entire record, including my observation of the witnesses, and all briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is an Illinois corporation with an office and place of business at Gurnee, Illinois, where it is engaged in chemical processing. During the past fiscal year preceding the issuance of the complaint, a representative period, the Respondent sold and shipped goods valued in excess of $50,000 from its Gurnee, Illinois plant directly to points located outside the State of Illinois. I find that the Respondent is an employer engaged in commerce within the meaning of the Act, and that to assert jurisdiction over its operations will effectuate the policies of the Act.

II. THE BUSINESS OF THE RESPONDENT AND BACKGROUND

Mazer Chemicals employs approximately 100 persons who custom blend chemicals at the Gurnee location. The Company operates seven chemical reactors in its reactor room. The employee operators work in shifts from from 7 a.m. to 3:30 p.m.; 3 to 11:30 p.m.; and 11 p.m. to 7:30 a.m. and rotate the shifts every 4 months. Supervisors, however, do not rotate with employee operators and the supervisors' shifts are begun 2 months into the operators' shift and rotate in the opposite direction. Thus, each shift has a different supervisor every 2 months.

Employees receive daily work orders for blending of various chemicals from the supervisor or foreman at the beginning of each shift.

Officers and supervisors at Mazer include Glen Leith, plant manager in charge of product control. Leith works under direct control of John Roach, vice president and general manager. Michael Guibault was the shift foreman at the time of the Charging Party's termination; Patrick Kingston was engineering office coordinator; Dennis Dingsdale, general foreman reporting directly to the plant manager; Joe E. Peterson Jr., maintenance department head; and Ron Schwartz, plant engineer.

The Respondent maintained a procedure whereby requests for maintenance could be filed by any employee when repairs for various pieces of equipment were needed for ensuring safety. The procedure was set forth in the production employee manual given to each employee entering the Respondent's employment. Completed maintenance requests forms were retained by Mazer, and Kingston was custodian as well as the official who supplied blank forms for employees. During the period February 1979 to April 1980 approximately 600 requests were filed by employees. Of these requests the Charging Party herein filed two on March 27, 1980.

Among the other means available to Mazer employees to bring safety problems to the attention of the Respondent were: (1) the safety committee composed of employees from each department who conduct site inspections once a month accompanied by any employee who wished to participate; (2) any monthly managers' meeting with officers where safety matters could be discussed by safety committee members invited to attend; (3) safety citations written by any employee and distributed to the immediate supervisor of the offender and to the offender; (4) the discussion committee where representatives from each department expressed opinions of their fellow employees on safety matters; and (5) accident report forms completed by shift foremen.

Further safety protections provided by the Respondent included masks, hats, gloves, and boots when protective clothing was needed during work.

III. THE ALLEGED UNFAIR LABOR PRACTICE

The Charging Party, Roger Tobara, was employed by Mazer Chemicals from February 7, 1979, to April 4, 1980. He was an operator-helper and then an operator when the job title was changed. As a chemical room operator, Tobara would load one of the several reactors. This involved setting up, moving and weighing of chemicals, charging them to the reactor, monitoring the reactions, and unloading when the reactions were finished. The Charging Party is 27 years old with some college training at Eastern New Mexico University and two courses in chemistry at College of Lake County. One of these courses was paid for in part by the Company. In January 1980 Tobara contacted Occupational Safety and Health Administration's regional office in Chicago by phone and received from the agency a copy of the general industry handbook and literature on occupational cancer.[1] Also in January 1980, Tobara had a conversation in the quality control lab with technician Mike Curtis. Tobara asked Curtis about dioxane because Tobara was concerned that "a lot of dioxane" was being stripped from products in the reactor room. Tobara was concerned that the chemical had contamination possibilities. Curtis described to Tobara what the FDA standards were and that .05 parts per million were allowed but FDA was changing that to permit only a trace level. Tobara was basing his question on information taken from unspecified chemical essays which he had found in the library at the College of Lake County. The material from the unnamed source dealing with dioxane was copied by Tobara.

About the middle of January, Tobara began keeping personal notes about the mixing data of Mazer products.[2]

At the end of January 1980, Joe E. Peterson Jr. had several conversations with Tobara about maintenance request forms. Tobara told Peterson that the "hot well" was continuously leaking into the reactor room; that there was escaping vapor and that the contents of the well were bubbling onto the floor of the reactor room. Tobara testified that he filled out a maintenance request and gave it to Peterson to have the hot well gaskets changed and the well completely sealed up.[3] This hot

[1] Tobara made only general requests of the OSHA contact and received the "General Industry Handbook" on the agency's safety and health standards. This book is part 1910, Title 29 of the Code of Federal Regulations. The "cancer" literature if separate from the data contained in the handbook was not further specified during the hearings.

[2] This early date for Tobara's copying efforts and the fact that some of the data copied did not concern his complaints demonstrated that Tobara probably had some other motive for the copying than his professed interest in health and safety of his coworkers.

[3] While Tobara claims the form was filled out by him, testimony in these hearings showed that he signed only those maintenance requests of March 27, 1980. I have concluded that this was an oral request to Peterson.

well is connected to the vacuum system and prevents contaminants from escaping into the atmosphere. Tobara discussed the hot well system with Mike Yuswat, Bill Worthington, and Dave Curley, three other reactor room operators.

About February 15, 1980, at the reactor room desk on the third shift, Tobara spoke with Mike Yuswat, the safety representative for the shift, about the problem of the hot well system leaking into the reactor room. There had not been a response to a previous maintenance request and Tobara told Yuswat that a maintenance request should be filed again. Yuswat agreed and he initiated the writing of another maintenance request. This request was given to Joe Peterson by Yuswat. The contaminant that Tobara was concerned about was dioxane that was being stripped from the product being run in the reactor. On the same date and shift, Tobara also had a conversation with Richard Chopin, the shift's lead operator, about the leaking hot well, and Chopin agreed that he had also asked that the Company seal or remove it from the reactor room but it had remained.

On February 16, 1980, Tobara had a conversation with Mike Guibault, foreman from another shift, while the two were in the reactor room, during a shift overlap. Tobara told Guibault that there was trouble with the hot well system leaking and bubbling over and that another request had been made to have it repaired. Guibault replied that the system had been operating like that for years and that he was glad that he was a foreman and did not work in the reactor room with all that "garbage."

Again on February 16, 1980, Tobara spoke with Joe E. Peterson in the reactor room during the very early morning part of the shift. Peterson had been called to the reactor room during the very early morning part of the shift. Peterson had been called to the reactor room on the paging phone by Tobara. The two went into the reactor room where the hot well system was bubbling over on the reactor room floor. Tobara told Peterson that the employees could not have this continually happening, and Peterson told Tobara that there was no danger. After Tobara told Peterson that there was dioxane in the bubbling water as a byproduct of the manufacturing process producing ethylene glycol then working the reactor, Peterson agreed to get maintenance to take care of it. Tobara noted the presence of fumes in the reactor room area. The fumes had an irritating smell and taste but Tobara continued working. About 5 a.m. a maintenance man began working on the pump, and when Tobara left about 7 a.m. he did not know what had been accomplished.[4]

Also on February 16, 1980, Tobara had a conversation with Howard Punzel, the relieving shift foreman. The conversation took place at 7 a.m. when Tobara told Punzel that "we had had problems" with the hot well leaking and bubbling over. Punzel acknowledged the information as being received from one of the foremen and that he knew that maintenance was working on it.

On February 29, 1980, Tobara had a conversation with Mike Guibault about the hot well system when Tobara was on the second shift and Guibault was the supervisor of the shift. While at the reactor room desk during this shift Tobara told Mike Guibault that the hot well was still leaking and periodically bubbling over, and that "we" had filed a maintenance request to have it repaired, but that nothing had been done.[5] At the time the system was giving off steam vapors and bubbling over while dioxane was being stripped from the product in the reactor.

On March 4, 1980, Tobara had a conversation with Pete Buffer and Stanley Clark, Mazer employees, about a production problem in the blending in a large kettle of the product dimethyl polysiloxane. The two named employees had the product on the floor and on their hands. While attempting to load one of the drums onto a forklift to dump the chemical contents into the tank, the drum fell and spilled chemicals onto the floor and the operators. When Tobara inquired if the employees had been given specific instructions in the handling of the spilled chemicals, they indicated they had not.

On March 6, 1980, Tobara spoke with Guibault about two employees whom Tobara had observed dumping bags of chemicals into a melt tank. Tobara had asked these employees what they are making and what their instructions were concerning the use of a respirator mask or gloves. The employees told Tobara they had no specific instructions and, after showing the label to the employees, Tobara paged Guibault to come to the reactor room were the bags were sitting and asked Guibault why these employees had not had instructions to wear respirators or to have on gloves. There was a cloud of chemicals in the air where the conversants were working. Later during the shift, Tobara saw the two employees wearing dust masks.[6]

Again on March 6, 1980, Tobara in conversation with Guibault complained that an uncovered drum in front of the tech service lab contained volatile chemicals, half-filled with a liquid, was in a no-smoking area and that there were cigarette butts on the floor leading up to the drum. Guilault replied that this was one being used as a slop drum by tech service personnel. Tobara identified to Guibault that the drum was a drum of the same chemicals which had been spilled by the two employees several days before. The particular drum was not marked flammable but as a slop drum. The product in the drum was not necessarily the product shipped in that drum, dimethly polysiloxane. The area where the drum was located was a no-smoking area and a flammable solvent locker was sitting next to the drum.

[4] I have accepted Tobara's factual recitation including the presence of a maintenance man and reject as beyond the scope of Tobara's knowledge what was accomplished, since it does not appear logical that a maintenance man would have worked for 2 hours with "nothing" being done. I further draw the inference that Tobara would have accepted nothing less than sealing up of the irritant, the hot well system, and that if his analysis of the problem was rejected by maintenance, then "nothing" was done.

[5] Tobara repeatedly used "we" when the testimony shows that Tobara, if acting at all, was acting alone.

[6] The expected reaction to one standing in an area where dangerous chemicals are being inhaled would be to get the masks first and then take action to notify the supervisor. There was no duty on the employee to give Tobara any information as to their instructions.

Several days after March 6, Tobara had a conversation with Joe Peterson Jr. in the locker room at Mazer at 11:30 p.m.—the end of the shift. Peterson was the relieving shift foreman. Tobara told Peterson about the drum incident and that, although the slop drum had been covered, it had not been removed and in Tobara's opinion the covered drum was a safety concern.

About March 21, 1980, Tobara had a conversation with Ron Schwartz about the hot well system. The conversation took place in the breakroom at the beginning of the shift in the presence of Joe Peterson Jr. Tobara complained that new gaskets should be installed on the hot well system and that it be sealed or removed. Schwartz replied that gaskets had been changed and that different gaskets had been ordered because they deteriorated so fast they could not be kept up with; Peterson confirmed this.

On either March 26 or 27 Tobara had a conversation with an employee Pete Buffer, about the product he was making in reactor no. 8. The conversation took place in the highrise.[7] Buffer told Tobara the product was a monomer acid cooking in the reactor. After Tobara left the highrise he noticed a hose running off of reactor no. 8 and venting on to the railroad tracks and underneath the train. Two employees were unloading the train and, when Tobara asked them if they had been told what the hose was doing there, they responded that they had not. Tobara then told the employees that, based on Tobara's knowledge, the vapors given off were of a toxic nature and should not be breathed for a long period of time. Guibault was told by Tobara about the incident. In a conversation in the latter part of March 1980 with Guibault during the second shift when another employee was present, Tobara asked why "we" had not received a response to a maintenance request concerning the ventilation system in the reactor room. Guibault suggested that Tobara go to see either Ron Schwartz or Pat Kingston. In a conversation immediately thereafter with Kingston and Peterson, Tobara asked why a maintenance request he had "filled out" a few weeks prior requesting that the ventilation be fixed in the reactor room had not been acted upon. Kingston was not aware of the request but told Tobara that, even if the ventilation system was as Tobara had described to him, the ventilation system would continue operating at a sufficient air flow with all the adjustable heads open, but if the missing heads were replaced and the holes plugged it would maximize the efficiency of the system on the reactor where vapors came off.

On March 26, 1980, Tobara had a conversation with Yuswat and Worthington in the reactor room about a cloud of vapor coming into the reactor room from the slop pit behind this room. The vapors could be smelled and seen. Yuswat recommended that the plant engineer be contacted to check on the problem. Later during that day Tobara had a conversation with Schwartz by the slop pit located 4 or 5 feet from the reactor room. Present were Tobara, Yuswat, Schwartz, and later Guibault. Yuswat, as a shift safety representative, had called in Schwartz. Tobara told Schwartz that "we couldn't have the vapors coming off the slop pit and rolling back into the reactor room like that."[8] Schwartz suggested that the piping needed to be reworked to vent the roof. When Guibault arrived he was told by Tobara that Schwartz was being made aware of the vapor problem in the reactor room. Guibault wanted to know if water was put on the condensers and Tobara went to the second floor where the controls were located and determined that the condenser was at 150 degrees and the water on.

Guibault sought out and found Tobara in the shower room on March 26, 1980, preparing to terminate his shift early while a pump Tobara had been using was left running causing potential damage to the seals of the pump. To Guibault's query as to "Why," there was a response of "Bullshit." On March 31, Guibault found Tobara in the plant handling sulphuric acid without wearing safety goggles.

In March 1980 Dennis Dingsdale reported to Leith that Mike Guibault "was having trouble getting Roger to perform his job . . . Roger did a lot of complaining . . . . When assigned a job, he would go to the job but then he would come back complaining all the time . . . it was getting worse and worse . . . ." Leith instructed Guibault that he did not have to put up with it and that if Tobara was not doing his job and keeping Guibault from doing his, then Guibault would have to let Tobara go. Leith was aware of Tobara leaving his job and of the pump incident and other difficulties Guibault was having with Tobara.

On April 4, 1980, during a check of a stationary tank in a different part of the plant from where Tobara was working, he sought to determine whether the product in the tank was liquified. He opened the bottom valve and was sprayed down the front with chemicals—either a fatty animal or vegetable acid. Tobara went to the quality control lab where Shift Supervisor Guibault was called out and shown the valve. Guibault noted that the nitrogen line had been sheared off the top of the valve and when the valve was opened the liquid was directed out of the broken pipe. Guibault promised to have maintenance make repairs. While on the way to the scene from the lab, Tobara told Guibault that he was aware that people were becoming irritated with him about his constant complaining about safety and health problems. Guibault was told by Tobara that he would go to OSHA or FDA. Guibault responded that a certain amount of breakdowns were expected in a job. Shortly after the incident, Guibault called Tobara to the reactor room desk where Guibault told Tobara that he was tired of Tobara "bitching" about the plant and suggested that if Tobara did not like the conditions he could leave Mazer employ. Tobara replied that there were Federal laws and regulations and that he intended to go the following Monday to contact OSHA and report what was going on in the plant. Twenty minutes later in the presence of Bill Worthington and John Moncatch, Guibault told Tobara that Dennis Dingsdale had discharged Tobara in a phone

[7] This in an area where chemicals are stored and is separate from the reactor room.

[8] The record is silent on what product was being worked and if the vapors contained dangerous materials.

conversation with Guibault. Tobara, in the company of Guibault, telephoned Dingsdale, general plant manager. Tobara inquired if Dingsdale had just fired him and was told that he had been fired for "a lot of bitching, a lot of complaining." Further, Dingsdale indicated to Tobara that he believed Tobara had "set up" the incident with the vapors in order to have grounds for calling Ron Schwartz to the reactor room to complain. Tobara denied that he set up the instance and told Dingsdale that it was against the "law" for Dingsdale to fire Tobara for that reason.

On April 7, 1980, Tobara asked Glen Leith for his job back but was refused. On April 9, 1980, when Tobara went to the Respondent's office to pick up his check, Leith received Tobara in his office and at Tobara's request had Guibault in as well. Guibault, in Leith's presence, told Tobara that his discharge was because Tobara was constantly complaining about health and safety problems. Tobara replied that all his complaints were valid ones concerning defects in the plant which were "killing" his friends.[9] Tobara again listed the complaints he had previously enuniciated.

The last contact that the Charging Party had with Mazer was on April 10, 1980, when he told Leith that it was his impression that OSHA standards required the Company to provide physicals. Leith refused to provide Tobara with a physical.

Leith was aware of an accident report concerning Tobara's fall on slippery stairs on April 3, 1980, the day before Tobara was fired.

Tobara's complaints pulled Guibault away from his work and Tobara lost worktime as well to complain when he had open the option of filing a maintenance request for the work needed. Guibault urged Tobara to fill out the maintenance requests. Tobara refused to follow any established company procedure, and the manner of the complaints caused Guibault to leave his work to handle Tobara's complaints while Tobara was not doing his assigned work. On the day of his discharge, Guibault noted, even after the current complaint had been straightened out by his foreman that it was to no avail and that, "I could see if I had fixed a thousand things he'd said that night, it would still be the same. It wouldn't have mattered . . ." Tobara also did school homework on the job and did not follow safety procedures established by the Respondent.

The only contact that Tobara ever had with OSHA prior to April 4, 1980, was the call to OSHA to obtain information about chemical plant operations which call generated the General Industry Standards Manual being sent to Tobara. *There was no complaint filed with OSHA or any other agency.*

Tobara's complaints concerning safety conditions in the Respondent's plant clearly are within the protected activity of an employee. The Board has held that whether an employee's complaints about safe working conditions are real or imaginary is immaterial to the exercise of an employee's Section 7 right to complain. *C & I Air Conditioning*, 193 NLRB 911 (1971).[10] The activity is protected by Section 7 of the Act. *Du-Tri Displays*, 231 NLRB 1261 (1977); *Alleluia Cushion Co.*, 221 NLRB 999 (1975).

Certainly the complaints standing alone would constitute protected activity but the uncontradicted evidence in this record demonstrates that, in each of the incidents detailed by both the Charging Party and the Respondent, the complainant's manner became profane, belligerent, angry, and abusive. Tobara never admitted that he presented his complaints in a manner so to raise other serious problems for his supervisors or coworkers; rather he insisted that his complaint was based on safety and absolute priority over all other activity in the plant. No matter if it drew company supervisors from other duties in this chemical plant, and no matter that, in his role as a safety zealot, Tobara's own work with chemicals began to deteriorate. There was a damaging cumulative effect of these constant complaints which, when viewed against a background of disruption to this Company, created a safety hazard of dangerous proportion. Tobara's right to complain does not, however, include the right to disrupt. Tobara's activity was clearly beyond what can properly be considered as protected activities under Section 7.

On April 4, 1980, even Tobara had come to see that his constant complaints had resulted in problems for his supervisor when this Charging Party told the supervisor that he knew that numerous complaints were a problem for the Company and that persons at Mazer had become "tired" of his complaints. Recognizing his position as that of a disruptive employee bordering on the termination of his employment, Tobara then made the ultimate threat that he would go to OSHA. But the action and threat had come much too late for it to be considered as an activity of a sincere individual truly concerned with the safety in the plant for himself and his coworkers.

If Tobara considered the safety of his coworkers to be in immediate danger, he took a roundabout road to reach the ultimate threat on April 4. For part of January, all of February and March, and into April, Tobara squirreled away each incident of a failure within the plant and never approached OSHA or any other governmental or private agency to seek the relief he demanded. Tobara's credibility gap is indeed a vast one calling into doubt his entire pattern of activity from the failure to solve safety problems while even taking the Company's material and copying it for his own files. These notes he later admitted giving to an attorney for use in a legal action against the Company.

Discharge for demonstrated cause when the employee has become unsuited for further employment has been found by the Board not to be a violation of Section 8(a)(1) of the Act. *United Gas Distribution Co.*, 187 NLRB 225 (1970). The Board said (at 233):

[9] There is no evidence that death or even injury occurred to other employees at Mazer.

[10] Although the Ninth Circuit set aside this ruling and found that the complainant must be shown to have acted for mutual aid and protection of other employees to come within the protection of concerted activity, 486 F.2d 977 (1973). Also the Third Circuit in *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (1964), held an individual complaint about safety cannot be deemed concerted activity because the complaint did not involve efforts of other employees.

> The credibility resolutions concerning certain aspects of . . . testimony essentially cripple the major arguments of discriminatory motivation. The credited facts as a matter of evidentiary weight reveal that a preponderance of the evidence supports the Respondent's contended defense and likewise reveal an insufficiency of facts to support General Counsel's contention of discharge for discriminatory reasons.

Here the facts of record work against acceptance of the General Counsel's argument on brief that Tobara was discharged by the Respondent because of health and safety complaints and/or because he threatened to report the Respondent to OSHA and therefore was discharged.[11] The record here clearly has shown that the latter argument must be rejected. If Tobara had been discharged because of health and safety complaints then he clearly would be a candidate for reinstatement. But the evidence is that there were other grave errors in Tobara's activity. His failure to file complaints concerning safety with the Company demonstrated his rejection of any order. I draw from this conduct the inference that whatever Tobara's motive may have been the health and safety complaints were merely the vehicle Tobara used to further his unspecified end goal. Concern for fellow workers and friends never took the course of even simple charity—rather Tobara was made to take on heroic proportion in protection of "his people." But Tobara was in the end unsupported by these coworkers.

The Respondent has demonstrated why Tobara was discharged and the sum of its position is that Tobara was discharged for causes outside his activity regarding health and safety. These causes include (1) frequent and sustained disruptive conduct over 3 months in which Tobara refused to follow required and voluntary procedures by complaints made in anger and in a belligerent manner causing distraction of management personnel with potential danger to employees in a chemical plant; (2) Tobara's frequent failure to exercise on his own behalf and that of his coworkers' safety and maintenance standards in handling of chemicals and equipment; and (3) quality of work and attitude deteriorated by Tobara's own time away from his duties as an operator in this chemical plant. An employer does not violate Section 8(a) when it discharges for demonstrated cause. *United Gas*, supra. As the Respondent notes on its brief a "troublemaker" may be discharged, *R & E Transportation Corp.*, 188 NLRB 380 (1971), and even where an employer had created a safety hazard by locking the front door to the premises, the employer could discharge an employee who the employer had found unfit for employment prior to the employer committing the safety violation. *Peer Enterprises*, 218 NLRB 987 (1975). There is no precise time when Respondent found that Tobara was subject to discharge but there had been a discussion by Guibault and Dingsdale that Tobara was a problem and was taking Guibault away from his duties and not doing his own assigned jobs. Certainly within the time frame of late January 1980 and April 4, 1980, ample discussions had occurred within Mazer whether Tobara should be retained and even Tobara appeared aware of his status on the night of April 4 when the final complaint was the last straw the foreman would tolerate.

Tobara's conduct placed his constant complaints outside the protection he could or should expect under the protected activity covered by the statute. While work in or near chemicals may conjure up horror stories, reasonable persons seek to reduce risks and dangers to the bare minimum. Tobara did nothing of a constructive nature not because he imagined these dangers but because he felt he had read, studied, and questioned, thus was qualified to deliver his opinions with the weight of a geometric axiom. Not even when he saw vapors which he "thought" were dangerous being breathed did he act constructively to prevent injury. Rather he collected the instance as one more he could add to the collection. If Tobara was sincere, the actions belie the belief.

In sum, I am convinced, conclude, and find that the preponderance of the evidence reveals that the Respondent discharged Tobara for cause because of its problems in attempting to supervise Tobara. Accordingly, it will be recommended that the allegations of discriminatory conduct in this discharge of Tobara in violation of Section 8(a)(1) be dismissed.[12]

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. At all times relevant herein, Roger Tobara has been an employee within the meaning of Section 2(3) of the Act, and not a supervisor within the meaning of Section 2(11).
3. The Respondent did not violate Section 8(a)(1) of the Act by discharging Roger Tobara because he engaged in activity protected by Section 7 of the Act.

ORDER

The complaint is dismissed.

[11] The Charging Party throughout his testimony was concerned about his complaints and did not seek help from OSHA in resolving the dangers to the health and safety of his colleagues.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.